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95-1690

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VILLAGER POND, INC.,

Petitioner,

vs.

DARIEN, TOWN OF; DARIEN PLANNING AND ZONING COMMISSION, ALSO KNOWN AS PLANNING AND ZONING COMMISSION OF THE TOWN OF DARIEN; FREDERICK R. SAMMIS, INDIVIDUALLY AND AS SELECTMAN OF THE TOWN OF DARIEN; FRANKLIN E. PENN, INDIVIDUALLY AND AS CHAIRMAN OF THE DARIEN PLANNING AND ZONING COMMISSION; EDMUND F. SCHMIDT, INDIVIDUALLY AND AS A MEMBER OF THE DARIEN PLANNING AND ZONING COMMISSION; RAYMOND D. NURME, INDIVIDUALLY AND AS PLANNING AND ZONING DIRECTOR OF THE TOWN OF DARIEN; DAVID J. KEATING, INDIVIDUALLY AND AS ASSISTANT DIRECTOR/ZONING ENFORCEMENT OFFICER OF THE TOWN OF DARIEN; AND JANE F. BRANIGAN, INDIVIDUALLY AND AS AN AGENT OF THE TOWN OF DARIEN REPRESENTATIVE TOWN MEETING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RIDGELY WHITMORE BROWN
BROWN & BROWN
Counsel for Petitioner
P.O. Box 1205
Darien, Connecticut 06820
(203) 655-8880

7/4/95

QUESTIONS PRESENTED

1. Whether constitutional protection from violations of due process and property rights should be subject to the threshold inquiry labeled the "clear entitlement test"?

2. Whether the Court of Appeals erred in unbundling the damages flowing from the violation of due process rights and simply characterizing those damages as takings and then dismissing them as not ripe?

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Villager Pond, Inc., petitioner, requests that this court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered May 17,

1995, sustaining the appeal from the District Court's dismissal for failure to state a claim under the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals reversed in part, affirmed in part, and remanded.

OPINION BELOW

The opinion of the United States Court of Appeals, Second Circuit, is reported at 56 F.3d 375 (Second Cir. 1995). It is reproduced in this petition at Appendix A.

JURISDICTION

The jurisdiction of this Court to decide federal questions is invoked pursuant to Title 28 United States Code Section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads, in pertinent part, as follows: "[N]or [shall any person] be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution reads, in pertinent part, as follows: "[N]or shall any state deprive any person of life, liberty, or property without due process of law; . . ."

STATEMENT OF THE CASE

The petitioner-plaintiff, Villager Pond, Inc. ("the developer") filed a claim under 42 USC Section 1983 against the Town of Darien, the Darien Planning and Zoning Commission and various individual defendants, acting in both their individual and official capacities alleging that the defendants improperly withheld zoning compliance permits for condominium units built by the developer so as to coerce the developer into conveying two condominium units to the Town. The

Town subsequently sold the units for a profit which went to the general fund.

The District Court of Connecticut (Dorsey, J.) dismissed the complaint for failure to state a claim (Appendix B). The United States Court of Appeals for the Second Circuit reversed in part, affirmed in part, and remanded with direction to determine (1) whether the discretion to issue the zoning permits was so limited that a property interest existed in those permits, (2) to determine whether the adding of the condition of conveying two condominium units was so arbitrary that substantive due process was violated and (3) if so, whether the plaintiff suffered damages as a result of the delay in having the permits issued (App. 8-9).

The developer's complaint alleges violations of its constitutional rights to substantive and procedural due process and of its right to be compensated for a taking of its property for public use. The developer alleged that the defendant commission granted a special permit authorizing the construction of 37 condominium units stipulating that two units permanently be reserved for use by moderate income individuals. After purchase, financing, and construction commenced in reliance on the issuance of the special permit which on its terms did not require any conveyances to the Town, the developer alleges that the certificates of occupancy and zoning compliance permits were withheld by the Town despite the existence of a ministerial non-discretionary duty to issue them and that the municipal defendants coerced the petitioner by refusing to issue compliance permits unless Villager Pond conveyed the two moderate income units to the Town. The Town eventually conveyed one of the units for a substantial consideration but with no restriction limiting subsequent resale to persons of moderate income. The second unit was conveyed with some restrictions. The profits from both sales went into the Town's general fund. The conveyances took place within 3 years of the filing of the complaint in this action.

The Court of Appeals held that because the final special permit had already been granted, the petitioner's property

right in that permit had vested and, therefore, that the District Court improperly dismissed the due process claims on the ground that Villager Pond had no property interest in the special permit (App. 5-6). The Court of Appeals then remanded with direction to determine whether the discretion to issue the certificates of occupancy and zoning permits was so limited that a property interest existed in those permits and then determine whether the coerced conveyance was so arbitrary that substantive due process was violated and then, if so, whether the plaintiff suffered damages as a result of the delay in having the permits issued.

Although the petitioner alleged that the conveyance of the units was a coercive denial of due process, the Court of Appeals analyzed the takings claim as a separate cause of action sustaining the District Court's dismissal because the takings claim was not ripe.

REASONS FOR GRANTING THE WRIT

I. The "clear entitlement" test improperly defines constitutionally protected property interests shifting the focus from the issue of whether the plaintiff has been improperly deprived of property in violation of the due process clause to focus primarily on the degree of discretion enjoyed by the authority issuing related permits.

The so-called "clear entitlement" test is simply an excuse by the federal and state courts not to face the reality of what happens to property rights in the state's land use and court systems. Since nearly all permits are discretionary, there would be virtually no clear entitlements, no remedies and no constitutionally protected property interests. The results fly in the face of the Supreme Court's declaration:

> We see no reason why the takings clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ."

Dolan v. City of Tigard, 512 U.S. _____ 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

There is no nexus between providing moderate income housing which is routinely done by profit oriented developers as well as non-profit organizations, and the defendants' post permit extra-legal requirement that the units be conveyed to the defendant Town of Darien. As the Court observed in *Nollan v. California Coastal Commission*, 483 US 825 at 837, 107 S.Ct. 3141 (1987) the Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between the salutary objective of providing moderate income housing and the extra-legal condition requiring conveyance of the units to the Town. Among other things, the Town was unjustly enriched. "The absence of a nexus left the (defendant) in the position of simply trying to obtain (property) through gimmickry, which converted a valid regulation of land use into 'an out-and-out plan of extortion'" *Nollan*, at 837. If there was such a nexus how could the town resell one of the units with no moderate income deed restrictions and pocket the money for both units?

It was once possible to argue that "[I]f a land owner meets the conditions set forth for a special exception, the board is bound to grant one," *Sheridan v. Planning Board of Stamford*, 159 Conn. 1, 266 A.2d 396, 404 (1969). "[T]he board does not have the untrammeled discretion to decide whether a special permit should or should not issue, and if all the conditions and standards of the ordinance are met, the board cannot deny the permit without sound reason." *Abramson v. ZBA of Westport*, 143 Conn. 211, 120 A.2d 827 (1956). That is no longer the law, however, because although the special permit is an administrative device and, therefore, in theory, must be granted if all the conditions have been met, recent decisions of the Appellate and Supreme Courts in Connecticut have treated the special permit process as discretionary. *Barberino Realty and Development Corp. v. P & Z Com'n of Farmington*, 222 Conn. 607, 613, 610 A.2d 1205, 1208-09 (1992). There is even a case where the general standards in the regulations have been imported to the special permit process to

support a denial, *Connecticut Health Facilities, Inc. v. ZBA of Stamford*, 29 Conn.App. 1, 6-7, 613 A.2d 1358, 1361-62 (1992). This is a jurisdiction where it is common for lawyers and the courts to confuse special permits or exceptions with variances, see *Mitchell Land Co. v. ZBA of Greenwich*, 140 Conn. 527 at 530, 102 A.2d 316, 319 f.n.2 (1964), where the court listed 32 cases in which variances had been sought but where the owners were actually, though unwittingly, seeking exceptions.

Property rights are better protected since Justice William Brennan's seminal dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); see *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 US 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987); *Nollan v. California Coastal Commission*; 107 S.Ct. 3141, 97 L.Ed.2d 677, 483 US 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. , 112 4 S.Ct 2886, 60 USLW at 4849, 120 L.Ed.2d 798 (1992); and, *Dolan v. City of Tigard*, *supra*. "[T]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches." *San Diego Gas*, 450 US at 661. The legislative policies of municipalities in adopting zoning ordinances is intentionally designed to confer the broadest possible discretion on the decision makers not only so they can maximize their unbridled discretion and, therefore, their power, but also to shield themselves from liability. Under the clear entitlement test, all a municipality need do in order to insulate itself from all claims for damages is sprinkle discretionary language throughout the regulations. In case this court views this argument as farfetched, let us look at Justice Brennan's analysis: "Invalidation of the unconstitutional regulation unaccompanied by payment of damages would hardly compensate the land owner for any economic loss suffered during the time his property was taken. Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause." *San Diego Gas*, 450 US at 655, 101 S.Ct. at 1306. He explained in f.n. 22:

> "The instant litigation is a good case in point. The trial court, on April 9, 1976, found that the city's actions effected a "taking" of appellant's property on June 19, 1973. If true, then appellant has been deprived of all beneficial use of its property in violation of the Just Compensation Clause for the past seven years.
>
> Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow Attorneys the following advice:
>
> 'IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.'
>
> If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C.3d 110, [109 Cal.Rptr 799, 514 P.2d 111 appears to allow the city to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.
>
> See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, Avoiding and Defending Constitutional Attacks on Land Use regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original)."

Justice Brennan suggested that you have to hit them in the pocketbook:

> "[L]and use planning commentators have suggested that the threat of financial liability for unconstitutional

> police power regulations would help to produce a more rational basis of decision making that weighs the cost of restrictions against their benefits. Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, a policeman must know the constitution, then why not a planner?" (citation omitted) 450 U.S. 662, f.n. 26, 101 S.Ct. 1309.
>
> The voiding sanction obviously has left no impression upon the municipal defendants, see *D'Addario v. P&Z Cms'n, Darien,* 25 Conn. App. 137, 593 A.2d 511 (Conn. App. 1991) decided during the times of the instant municipal actions. Also reference West's Connecticut Practice Book Annotated Forms, 106.12-A, submitted by undersigned counsel based on another Darien land use extortion case in 1978.

Connecticut Supreme Court Justice Borden's *dissent* in *Kelley Property Devel. v. Town of Lebanon*, 226 Conn. 314, 343-352, 627 A.2d 909, 924-928 (1993), unequivocally rejects the clear entitlement test:

> ". . . I would hold that the ownership of property or the right to develop it for legitimate uses is sufficient to establish a constitutionally protected property interest under our own constitution. Both the Ninth and the Third Circuit Courts of Appeal; see *DelMonte Dunes v. Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990), *Bello v. Walker*, 840 F.2d 1124, 1127-30 (3rd Cir.) cert. denied, 488 U.S. 851, 109 S.Ct. 134, 102 L.Ed.2d 107 (1988); explicitly use this standard under the federal due process clause, as opposed to the Second Circuit's and our concomitant, more restrictive standard under the federal constitution."

There is a split in the circuits, the Second being in conflict with the Third and the Ninth, a Rule 10 consideration for granting this petition.

Justice Borden in an earlier First Amendment case, *Daughters of St. Paul v. ZBA, Trumbull*, 17 Conn.App. 53, 549 A.2d 1076 (1988), held that the general zoning standards were too discretionary and subjective to protect constitutional rights:

> "[T]he application of zoning regulations to restrict religious uses raises concern over the possible infringement of the constitutional rights guaranteed by the free exercise of religion clauses. . . . The possibility of discriminatory abuse of such regulations is obvious.
>
> "This possibility is rendered even more grave by virtue of the ability of zoning authorities essentially to insulate such a subjective decision from judicial review by failing to cite the facts that support their decision. . . . The great weight of the constitutional issues implicated leads us to conclude that, under the circumstances here, such a subjective decision as the one now under review must be reasonably supported by facts discernible in the record."

The subjective process in Connecticut does not pass constitutional muster for the First Amendment, so why should it pass muster for the Fifth, no longer a poor relation? Tondro, *Connecticut Land Use Regulation*, Section 7(C)(7), describes the abdication of the Connecticut Courts:

> "The [Connecticut Supreme] Court has sanctioned the emasculation of the substantive [zoning] doctrines' function of constraining the range of actions of a zoning commission . . . . [T]he Court has continued its relaxed supervision of local land use regulatory agencies through its oft-stated view that the local agencies are to be afforded a 'wide and liberal' discretion in making their decisions."

Closer court scrutiny, absent a damages remedy and constitutional protection of traditional property rights, would likely be a hollow victory: "[E]ven if the statement of reasons

requirement were enforced with a voiding sanction, commissions would soon learn how to 'fake it' writing up artificial reasons to satisfy the courts." *Davis, Discretionary Justice, A Preliminary Inquiry*, 105-106 (1969).

THE ZONING GAME, R. Babcock, (1966), a book cited with approval by Justice Brennan, *San Diego Gas*, U.S. 659, f.n. 25, 101 S.Ct. 1308, gives us a context:

> "Many planning commission hearings have taken on the character of an oriental bazaar where applicants wheel and deal with the commission on conditions and restrictions to be imposed on zoning. Some hearings are more like the ancient circuses in the coliseum of Rome in the days of Nero except that the Christians then got a better deal from the lions than some applicants do from the planning commission. . . . The protection of health, safety and general welfare has been forgotten in the desire to control competition, keep out foreigners, favor special interests, obtain public rights of way for free, zone tax users out and high tax payers in." Quoting Robert Michalski, "Zoning - The National Peril", Planning, 1963.

A government, ". . . by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Webb's Fabulous Pharmacies, Inc., v. Beckwith*, 449 U.S. 155, 164 (1980), *Lucas, supra.*

> "[I]f the protection against physical appropriations of private property [is] to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property [must] necessarily [be] constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].' *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). [W]hile property may be regulated to a certain extent,

> if regulation goes too far it will be recognized as a taking." *Ibid. Lucas, supra.*

The "clear entitlement" test, *RRI Realty Corp. v. Inc. Village Southampton*, 870 F.2d 911 (2nd Cir. 1989) gives free rein to the politicians to indulge that natural tendency with no risk or responsibility. If the framers of the Constitution had wanted to leave private property in the hands of the politicians why guarantee Just Compensation? Let us not underestimate the power of definition:

> *"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.*
>
> *"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."*
>
> *"The question is," said Alice, "whether you can make words mean so many different things."*
>
> *"The question is," said Humpty Dumpty, "which is to be master - that's all." Carroll,* Through the Looking Glass (1872).

So who's to be master? The politicians via word games?

Although property tends to become what courts say it is and some circularity must be tolerated, the definition is not circular in its entirety because "the expectations protected by the constitution are based on *objective* rules and customs that can be understood as reasonable by all parties involved." *Lucas v. S. Carolina, supra*, 112 U.S. 2886, 112 S.Ct. 2886 (1992) (Kennedy, J., concurring). (emphasis added)

"[T]he historical compact recorded in the takings clause . . . has become part of our constitutional culture. . . . *Lucas v. S. Carolina*, 505 U.S. , 112 S.Ct. 2886, 2900 (1992). "[O]ur takings jurisprudence, has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the bundle of rights that they acquire when they obtain title to property."

> "The current constitutional regime of "anything goes" unleashes a whole set of unwelcome political and economic consequences. The relentless pattern of judicial decisions has reduced the constitutional protection of property to a guarantee of bare legal possession. Virtually all the rights of use and disposition are subject to political veto. The current constitutional vacuum thus creates a fatal schism between power and responsibility that a sound system of property rights seeks to avoid: when only one side may use, but the other may veto, stalemate becomes the order of the day. The takings clause, designed to overcome holdout and coordination problems, has been made to atrophy as these problems multiply. Power expands to fill a vacuum, and legislatures continue to stretch the limits of the law and conjure up new forms of restriction, seeking to come ever closer to the threshold that calls for them to pay compensation without ever crossing that line. Without just compensation, private losses to owners are left off the social ledger, so that large losses are systematically created for the sake of small gains." *Simple Rules for a Complex World*, Epstein (Harvard University Press, 1995).

The Second Circuit gives the keys to the courthouse to local government when it lets self-defined discretion be the threshold inquiry. If constitutionally protected property interests depend on whether the politicians and bureaucrats sprinkle discretionary language throughout the regulations, "[s]ince such [discretion] can be formulated in practically every case, this amounts to a test of whether the [zoning commission] has a stupid staff." *Lucas*, f.n. 12.

> "[I]t is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that

> induced them to unite in society. No man could become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact." *Van Horne's Lessee v. Dorrance*, 2 US 304, 310 (1795).

This petition should be granted to reconcile the split between the circuits and to develop the recent trend of protecting property rights.

II. The Court of Appeals erred in dismissing the takings claims as not ripe.

The damages to the developer from the violation of due process is measured by the value of the units conveyed and other proximately caused damages. These damages are part of a cause of action for a denial of due process. The Circuit Court took the petitioner's alternate cause of action, a violation of the just compensation clause, separated it from the damages caused by the violation of due process rights, and held that these damages claims were properly dismissed as not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985). The Court of Appeals improperly extended *Williamson*:

> "The inverse condemnation requirement of *Williamson* applies whenever compensation is sought for land that is taken, whether the taking occurs by direct government action or the indirect action of obtaining the land as a condition of issuing a permit."

Since this Court has declared that property rights will no longer be treated like a poor relation to our other rights protected under the constitution, petitioner respectfully suggests that the implications of *Williamson* as it affects these rights be reexamined and, in any event, that *Williamson* not be extended as suggested by the Court of Appeals in this case.

> "[W]hether the theory . . . be that there was a taking under the Fifth Amendment [or a substantive Due Process violation] is immaterial. In either event, the claim

> traces back to the prohibition of the Fifth Amendment, 'nor shall private property be taken for public use, without just compensation.' The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' " *United States v. Dickinson*, 331 U.S. 745, 748, 67 S. Ct. 1382, 1384, 91 L.Ed. 1789 (1947), *San Diego Gas*, *supra*, at 654-655, f.n. 21.

Even if the theory of recovery were confined to due process damages, the text of both the Fifth and Fourteenth Amendments separately protect against deprivation of property without due process of law. To the extent that the Second Circuit purported to restrict due process damages to "damages as a result of the delay in having the permits issued" (A-1) the Court of Appeals erred. The error was compounded by characterizing the damages as "takings" damages, and therefore, unripe.

There is a split between the Circuit Courts of Appeal on these issues also. In this case, the Second Circuit took the deprivation of property portion of the due process claim, characterized it as a physical taking properly cognizable only under a takings theory and then dismissed it as unripe. In the Sixth Circuit those due process claims which are ancillary to a takings claim are unripe *Bigelow v. Michigan Dept. of Natural Resources,* 970 F.2d 154, 159-60 (6th Cir. 1992), but not if the deprivation was immediately sustained and concretely felt, *Nasierowski Bros. Inv. Co. v. City of Sterling Heights,* 949 F.2d 890, 894 (6th Cir. 1991).

The Tenth Circuit similarly distinguishes between regulatory takings and substantive due process claims applying different ripeness standards, *Landmark Land Co. of Oklahoma v. Buchanan,* 874 F.2d 717 (10th Cir. 1989). The Eleventh Circuit in *Eide v. Sarasota County,* 908 F.2d 716, 720-22 & 722 fn. 9 (11th Cir. 1990) has attempted to clarify the confusion in the substantive law by recognizing three separate causes of action involving takings and substantive due process issues describing (1) a "just compensation claim"; (2) a "due process takings claim"; and, (3) an "arbitrary and capricious due

process claim." Each of these claims is subject to its own ripeness standard. In comparison, the Second Circuit in *Southview Assoc., Ltd. v. Bongartz,* 980 F.2d 84, 98-97 (2d Cir. 1992), discusses the various types of takings and substantive due process claims and the ripeness standards applicable to each. No such explicit analysis was done in the instant case (A-8-9); the court restricted substantive due process damages to delay damages.

The Seventh Circuit, *Unity Ventures v. Lake County,* 841 F.2d 770, 774 (7th Cir. 1988) and the Third Circuit, *Taylor Inv. Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1294 (3rd Cir. 1993) go even further and conclude that both procedural and substantive due process claims are subject to dismissal on ripeness grounds basing some of the analysis on the sweeping references to due process law in *Williamson County, supra,* which were clearly overbroad.

Dolan, Nollan, and *First English* offer real protection of property rights in particular and a more civil libertarian regime of protection and remedies for those rights guaranteed by our Federal Constitution. All of the various confused and unnecessarily complex reasons advanced by the Federal Courts amount to a protracted war of attrition that makes it impossible to have any realistic protection from the predatory practices of the sovereign. See *Bargaining with the State,* Epstein, Land Use Restrictions, Chapter 12 and *Takings and Ripeness,* 48 Vanderbilt LR1 (1995).

Shortly before our Federal Constitutional Republic was formed, our forefathers had rebelled against a sovereign who ruled by divine right. Their complaints are enshrined in the Declaration of Independence, part of which was devoted specifically to bureaucrats:

> "He [King George III] has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance."

Government, our current sovereign, may not rule by divine right but has still exercised a sovereign power to send hither

swarms of officers called regulators and planners and environmentalists who see their goals as worthwhile, viewing themselves as wearing the white hats and serving the causes of "truth, motherhood and apple pie." They will continue to win the war of attrition so long as the federal courts continue to abdicate what should be an aggressive civil libertarian protection of our constitutional guarantees.

CONCLUSION

The Fifth and Fourteenth Amendments of the United States Constitution will continue to be poor relations to the First and Fourth Amendments in the Second Circuit until the "clear entitlement" test is overruled and the ripeness doctrine is confined to limited issues.

Respectfully Submitted,

THE PETITIONER,
VILLAGER POND, INC.

BY: _____

Ridgely W. Brown
Brown & Brown
P.O. Box 1205
Darien, CT 06820
(203)655-8880
Fed Bar No. ct06765

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 698—August Term, 1994

(Argued: January 20, 1995 Decided: May 17, 1995)

Docket No. 94-7564

VILLAGER POND, INC.,

Plaintiff-Appellant,

—v.—

TOWN OF DARIEN, DARIEN PLANNING & ZONING COMMISSION, also known as Planning & Zoning Commission of the Town of Darien, FREDERICK R. SAMMIS, Individually and as Selectman of the Town of Darien, FRANKLIN E. PENN, Individually and as a Chairman of the Darien Planning and Zoning Commission, EDMUND F. SCHMIDT, Individually and as a Member of the Darien Planning and Zoning Commission, RAYMOND D. NURME, Individually and as Planning and Zoning Director of the Town of Darien, DAVID J. KEATING, Individually and as Assistant Director/Zoning Enforcement Officer of the Town of Darien and JANE F. BRANIGAN, Individually and as an Agent of the Town of Darien Representative Town Meeting,

Defendants-Appellees.

Before:

NEWMAN, *Chief Judge*,
and MINER, *Circuit Judge*.*

Appeal from a judgment entered on April 29, 1994 in the United States District Court for the District of Connecticut (Dorsey, J.) granting the defendants' motion to dismiss for failure to state a Due Process or Takings Clause claim under 42 U.S.C. § 1983.

Reversed in part, Affirmed in part, and Remanded.

RIDGELY W. BROWN, Darien, CT (Brown & Brown, Darien, CT, of counsel), *for Plaintiff-Appellant.*

JOHN WAYNE FOX, Stamford, CT (Curtis, Brinckerhoff & Barrett, P.C., Stamford, CT, of counsel), *for Defendants-Appellees.*

MINER, *Circuit Judge*:

Plaintiff-appellant Villager Pond, Inc. ("Villager Pond") appeals from a judgment entered on April 29,

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* The Honorable Lewis A. Kaplan of the United States District Court for the Southern District of New York, who was originally a member of the panel, recused himself just prior to oral argument. The case is being decided by the remaining two judges of the panel, pursuant to Local Rule § 0.14(b). *See Murray v. National Broadcasting Co.*, 35 F.3d 45 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 734 (1995).

1994 in the United States District for the District of Connecticut (Dorsey, J.) dismissing its complaint for failure to state a claim under 42 U.S.C. § 1983. Villager Pond alleges in its complaint that the Town of Darien ("the Town"), the Darien Planning and Zoning Commission ("the Commission"), and various individual defendants, acting in both their individual and official capacities, (collectively "the Municipal Defendants") improperly withheld zoning compliance permits[1] for condominium units built by Villager Pond so as to coerce Villager Pond to convey two condominium units to the Town.

The complaint alleges violations of Villager Pond's constitutional rights to substantive and procedural due process, and of its right to be compensated for a taking of its property for public use. The district court dismissed the complaint, having found that Villager Pond did not have a property right in the special permit that it had obtained for the condominium development at issue, and further having found that its takings claim was not ripe. For the reasons that follow, we reverse the district court's judgment in part, affirm in part, and remand to the district court for further proceedings consistent herewith.

BACKGROUND

On this motion to dismiss for failure to state a claim, we must accept the factual allegations in the complaint

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[1] In the complaint, these documents are referred to as "zoning compliance permits," but in their briefs and at oral argument the parties sometimes referred to the documents that allegedly were withheld as "certificates of occupancy." For the purposes of this opinion, we will use the terms "zoning compliance permits" or "compliance permits" to refer collectively to the documents allegedly withheld by the Town.

as true. Villager Pond is a corporation organized under the laws of the State of Connecticut, and has its place of business in the Town of Darien. With respect to the property at issue in this appeal, Villager Pond is a successor in right, title and interest to a general partnership operating under the name ESP Associates that, in August of 1985, applied to the Commission for approval of a special permit to construct forty condominium units. The condominium units were to be constructed on property designated as the Villager Pond Condominiums located in the Town of Darien. On October 29, 1985, the Commission granted the special permit, authorizing, among other things, the construction of thirty-seven condominium units on the property. The special permit required, however, that two of the units permanently be reserved for use by "moderate income" individuals. Final approval of the special permit, which included the provision for moderate-income units, was granted in January of 1986.

Villager's constitutional claims turn on the allegation that, beginning in approximately July of 1987 and continuing until 1988, the Municipal Defendants withheld the issuance of documents known as "zoning compliance permits" on the two moderate-income units and on other units in the condominium complex. Zoning compliance permits are prerequisites for the sale and occupancy of the units. According to the complaint, the permits were withheld despite the existence of a "ministerial, nondiscretionary duty" on the part of the Municipal Defendants to issue them. In an act characterized by the plaintiff as "coercion," the Municipal Defendants refused to issue the compliance permits unless Villager Pond conveyed the two moderate-income units to the Town, rather than, as agreed, to a non-profit corporation created for the

purpose of holding and managing the moderate-income properties. According to Villager Pond, nothing in the Town's Zoning Regulations, in Connecticut's General Statutes or in the terms of the special permit required that the units be conveyed to the Town.

On July 18, 1988, as required, Villager Pond entered into an agreement with the Town pursuant to which Villager Pond agreed to donate one of the moderate-income units to the Town and sell the other unit to the Town for $90,000. The Town eventually conveyed one of the units to an unidentified individual for a substantial consideration, but with no restriction limiting subsequent resale to persons of moderate income. The second moderate-income unit also was conveyed by the Town for substantial consideration, but this deed did contain some restrictions on the subsequent resale of the property. It appears that the Town now has issued the certificates of zoning compliance.

Upon the foregoing facts, Villager Pond's complaint alleged that the Commission's actions violated its rights to substantive and procedural due process, in violation of the Fourteenth Amendment, and also that the actions amounted to a taking of its property without just compensation, in violation of the Fifth and Fourteenth Amendments. The defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and, in the alternative, moved for a more definite statement in anticipation of the assertion of immunity defenses. The district court dismissed the complaint for failure to state a claim. With respect to Villager Pond's claims of due process violations, the district court concluded that Villager Pond's allegations did not establish a protected property interest. With respect to Villager Pond's takings claim, the district court concluded that it was unripe

because Villager Pond had failed to seek compensation under the state constitution's takings clause. The district court therefore denied as moot the defendants' motion for a more definite statement. Villager Pond appeals.

DISCUSSION

The district court's dismissal of Villager Pond's action is a ruling of law that we review *de novo*. *See Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 99 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993). In exercising this review, our "task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . . [I]n passing on a motion to dismiss, . . . the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 235-236 (1974). Viewed under these standards, we conclude that we must remand.

1. Due Process

When a landowner alleges that he has been deprived of property in violation of the due process clause by the actions of a state zoning authority, we begin our inquiry by determining whether a constitutionally cognizable property interest is at stake. An applicant for a governmental permit has a protected property interest in the permit being sought only where "the applicant has a 'clear entitlement' to the approval sought from the government official or administrative body." *Walz v. Town of Smithtown*, ___ F.3d ___, ___ (2d Cir. 1995). In assessing whether a plaintiff has a "clear entitlement" to a permit, we "focus primarily on the degree of discretion enjoyed by the issuing authority, not the estimated prob-

ability that the authority will act favorably in a particular case." *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989); *see also Gagliardi v. Village of Pawling*, 18 F.3d 188, 192-93 (2d Cir. 1994). A clear entitlement, and, in turn, a constitutionally protected property interest, exists only when "the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." *RRI Realty*, 870 F.2d at 918. These standards have been crafted to strike the necessary balance between the landowner's need for constitutional protection and local governments' need to regulate matters of local concern. *See Zahra v. Town of Southhold*, ___ F.3d ___, ___ (2d Cir. 1995).

Appellant contends that the Supreme Court's recent decision in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), overrules our line of cases, such as *Walz* and *RRI*, which makes the existence of a property interest in a permit being sought turn on the restricted discretion of the authority issuing the permit. We disagree. *Dolan* protects a landowner's right, in some circumstances, not to be required to surrender his land as a condition of obtaining a permit, whether the discretion otherwise available to the issuing authority is broad or narrow. *Walz* and *RRI* are concerned with the distinct issue of whether an applicant for a permit has a property interest in the permit being sought.

After correctly recognizing the governing standards, the district court held that Villager Pond's allegations were insufficient to establish the existence of a property right, noting that "[p]laintiff does not allege an entitlement or property interest in the special permit. Nor does plaintiff allege that the Commission lacked discretion in

the issuance and enforcement of special permits. The absence of these allegations defeats [its] . . . due process claims." The court therefore dismissed the due process claims. This was error. Villager Pond alleged that, at the time the Municipal Defendants began to withhold the zoning compliance permits, the final special permit *already had been granted.* At that point, the "clear entitlement" test no longer was applicable to the special permit because the test applies only to permits being sought. The special permit, once issued, unquestionably was the property of Villager Pond. Therefore, the district court improperly dismissed the due process claims on the ground that Villager Pond had no property interest in the special permit.

The situation is different with regard to Villager Pond's asserted property interest in the zoning compliance permits. In order to establish a protected property interest in those permits, Villager Pond will have to establish a lack of discretion on the part of officials to deny their issuance. In *Sullivan v. Town of Salem*, 805 F.2d 81, 84-85 (2d Cir. 1986), we reversed a judgment dismissing plaintiff's due process claim where plaintiff had alleged that, although the houses he had built satisfied all the requirements of state and municipal law, town officials nonetheless had withheld certificates of occupancy for the houses. We reasoned that "[i]f the houses complied with the applicable state and municipal requirements, there was no element of discretion or judgment remaining for the building official to exercise in determining whether to issue the certificates." *Id.* at 85. Similar principles apply in this case, and upon remand the district court should consider whether Villager Pond can establish a property interest in the zoning compliance permits at the time they were withheld.

If the district court determines that, prior to the issuance of the zoning permits, the discretion to issue them was so limited that a property interest existed in these permits, then the court must determine whether the adding of the condition of conveying two parcels was so arbitrary that substantive due process was violated, and, if, so, whether the plaintiff suffered damages as a result of the delay in having the permits issued.

2. Takings

The district court properly dismissed as unripe Villager Pond's claim that it had been unconstitutionally deprived of compensation for the taking of its property. By "property" alleged to be taken unconstitutionally, we understand Villager Pond to mean its interests in the two units conveyed, allegedly by coercion. A landowner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). Thus, before a plaintiff may assert a federal takings claim, he must first seek compensation from the state if the state has a "reasonable, certain and adequate provision for obtaining compensation." *Id.* at 194 (internal quotations omitted); *see also Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 99 (2d Cir. 1992). Moreover, relief under a state compensation procedure must be attempted even where it "remains unsure and undeveloped." *Southview*, 980 F.2d at 99; *see also Austin v. City and County of Honolulu*, 840 F.2d 678, 680-81 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988). In *Southview*, for example, this court held that a takings claim was unripe where the plaintiff had not attempted to obtain

compensation under the Vermont State Constitution's takings clause, even though no court ever had interpreted that clause to require compensation for a regulatory taking. 980 F.2d at 99-100.

In light of the foregoing, it is clear that Villager Pond has not met the requirements outlined in *Williamson*. Here, as in *Southview*, the state constitution contains a straightforward takings clause:

> The property of no person shall be taken for public use, without just compensation therefor.

Conn. Const. Art. 1, § 11. This clause may be used as the basis of an inverse condemnation action to recover compensation for property taken from private individuals, even in the absence of a separate statutory remedy. *See Laurel, Inc. v. State*, 169 Conn. 195, 200 (1975). And although no Connecticut case has been cited wherein compensation was provided for a taking like the one alleged here, Villager Pond is still required to look to the state for compensation before its takings claim will lie. *See Southview*, 980 F.2d at 99-100.

Villager Pond attempts to avoid this result by contending that a plaintiff who alleges a physical taking, as opposed to a regulatory taking, is not required to seek compensation in a state proceeding before the claim will be considered ripe. In making this contention, Villager Pond cites *Southview*, wherein the plaintiff made the same argument by relying upon language in a Ninth Circuit case, *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281-82 n.28 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988). We reject Villager Pond's contention. First, reliance upon *Southview* for this contention is misplaced, because in that case the issue was not reached. *See id.* at 96. Second, the *Hall* decision has since been clarified by

the Ninth Circuit: "Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). We agree with this statement. *Williamson* drew no distinction between physical and regulatory takings, and the rationale of that case, that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State," 473 U.S. at 195, demonstrates that any such distinction would be unjustified. Thus, regardless of whether Villager Pond's claim alleges a physical or regulatory taking, the claim is not yet ripe for review.

In this connection, we also reject Villager Pond's argument that the question whether an action lies under the state constitution's takings provision has been answered in the negative by *Kelley Property Dev., Inc. v. Town of Lebanon*, 226 Conn. 314 (1993). In *Kelley*, the Supreme Court of Connecticut held that no state common-law cause of action for damages existed for official deprivations of due process, and it further refused to infer a cause of action under the theory of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and its progeny from the state constitution's due process clause. *See id.* at 330-343. As is clear, those conclusions have little to do with whether an adequate remedy for the asserted taking of the condominium units exists under the state constitution's takings clause. So long as a remedy potentially is available under the state constitution's provision, Villager Pond has not yet met the preconditions for a valid takings claim.

Finally, the same considerations defeat Villager Pond's argument on appeal that it has pleaded a cause of action under *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), a case handed down after the district court's judgment in this case. In *Dolan*, the Supreme Court held that where a municipality makes an adjudicative decision to condition the grant of a zoning permit on an applicant's dedication of property for public use, the municipality must demonstrate an "essential nexus" and "rough proportionality" between its legitimate zoning interest and the property dedication required. *See id.* at 2317-19. If this showing could not be made here, for example, the zoning decision would become a taking of the two units for which Villager Pond would have to be compensated. *See id.* at 2316-2317; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-36 (1987). However, unlike in *Dolan*, where the landowner challenged the conditions placed on the grant of a permit before the property was "taken," title to the two units conveyed in this case became vested in the Town before the suit was brought in the district court. Accordingly, Villager Pond's claim under *Dolan* is that, as a result of the conditions placed on the grant of the certificates of zoning compliance, the Town has taken property without providing just compensation. In this situation, *Williamson* dictates that Villager Pond must attempt to obtain compensation in the state courts before it may assert a claim under the Takings Clause in federal court. The inverse condemnation requirement of *Williamson* applies whenever compensation is sought for land that is taken, whether the taking occurs by direct governmental action or by the indirect action of obtaining the land as a condition of issuing a permit.

CONCLUSION

For the foregoing reasons, we reverse so much of the judgment that dismissed plaintiff's due process claim for failure to allege a protected property interest, we affirm so much of the judgment that dismissed plaintiff's takings claim as unripe, and we remand for proceedings consistent with this opinion.

APPENDIX B

APPENDIX B

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VILLAGER POND, INC. :

– vs – : Civil No. 3:93CV00712 (PCD)

TOWN OF DARIEN,
ET AL. :

RULING ON MOTION TO DISMISS

Plaintiff filed a complaint against the Town of Darien, the Darien Planning and Zoning Commission ("Commission"), and a number of officials of the Town or members of the Commission, both individually and officially. Defendants move to dismiss Villager Pond's complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In the alternative, defendants move that plaintiff be ordered to provide a more definite statement.

I. BACKGROUND

In 1985, plaintiff's predecessor, ESP Associates, applied to the Commission for a special permit to construct 40 condominium units on a subdivision known as Villager Pond Condominium. The Commission approved a permit for 37 units, two of which were to be reserved for moderate income occupants. Plaintiff alleges that during 1987 and 1988, the Commission, and defendants Nurme and Keating, withheld the issuance of zoning compliance permits, claiming that the two units for moderate income persons must be conveyed to the Town.

Plaintiff further alleges that the Town coerced an "agreement" to "donate" one of the reserved units to the Town, and to "sell" the second unit to the Town for $90,000. Plaintiff complied. The

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Town later conveyed one unit without limiting later conveyance to moderate income persons. The Town conveyed the second unit with such conditions.

II. DISCUSSION

Plaintiff alleges, under 42 U.S.C. § 1983, infringement of its Fifth Amendment protection against deprivation of property without just compensation. Plaintiff also alleges infringement of its Fourteenth Amendment procedural and substantive due process rights. Defendants have moved, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), for dismissal. Defendants assert the lack of subject matter jurisdiction because plaintiff's claims are not yet ripe. In addition, as to the due process claims in count two, defendants assert that plaintiff has failed to allege the elements of a due process claim.

A. Due Process Rights

Plaintiff alleges defendants' violation of its Fourteenth Amendment substantive and procedural due process rights. It alleges that in requiring that the two reserved condominium units be conveyed to the Town, its special permit was modified without notice or a meaningful opportunity to be heard. Plaintiff also alleges that the requirement of conveyance to the town of the two units was "not substantially related to a legitimate governmental objective."

These due process issues are central to a federal court's relationship to local planning and zoning. However, the role of the federal courts "is not and should not be to sit as a zoning board of appeals." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 13 (1974).

Disappointed applicants to planning and zoning authorities mounting a § 1983 due process claim must demonstrate "a legitimate claim of entitlement" to the permit sought. *Yale Auto Parts, Inc. v. Johnson,* 758 F.2d 54 (1985). The complainant must show that "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." *Id.* at 59. There must be a "property interest" in the permit at issue for a

denial to constitute infringement of due process rights. *Sullivan v. Town of Salem,* 805 F.2d 81, 84-85 (2d Cir. 1986).

Where a property owner has the requisite property interest in a permit or certificate, its denial by the local authority is an infringement of Fourteenth Amendment rights suitable for § 1983 redress. The owner's entitlement interest does not turn on the character of the local authority's actions however. In *RRI Realty Corp. v. Incorporated Village of Southampton,* 870 F.2d 911, *cert. denied,* 493 U.S. 893 (1989), the notion of "certainty or a very strong likelihood" in the rule of *Yale Auto Parts* was interpreted to mean that whether the property owner has an entitlement depends upon whether the permit "could have been denied on non-arbitrary grounds." *Id.* at 918.

> If federal courts are not to become zoning boards of appeals (and not to substitute for state courts in their state law review of local land-use regulatory decisions), the entitlement test of *Yale Auto Parts*—"certainty or a very strong likelihood" of issuance—must be applied with considerable rigor. Application of the test must focus primarily on the degree of discretion enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case. . . . The "strong likelihood" aspect of *Yale Auto Parts* comes into play only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured; an entitlement does not arise simply because it is likely that broad discretion will be favorably exercised.

Id. The court added that because the analysis emphasized the latitude of the local commission's discretion, the determination of the property owner's entitlement would "normally be a matter of law for the court." *Id.*

In the present case, *Yale Auto Parts,* elaborated by *RRI Realty,* requires a property interest in the zoning compliance permit issued by the Commission. Plaintiff's property interest

depends upon the breadth of the Commission's discretion. Plaintiff was granted authority to construct 37 units, two of which were to be permanently reserved for occupancy by parties having "moderate income." Plaintiff then alleges that the Commission, and defendants Nurme and Keating, abused their discretion concerning the special permit by requiring conveyance of the two reserved units to the Town. Plaintiff does not allege an entitlement or property interest in the special permit. Nor does plaintiff allege that the Commission lacked discretion in the issuance and enforcement of special permits. The absence of these allegations defeats their § 1983 due process claims. The conveyance requirement implemented or enforced the use restriction imposed on the two reserved units. Conveyance, subject to the entitlement to compensation, did not deny plaintiff a right of expectation contra to *Yale Auto Parts.* Further, any impropriety on the part of the town in the resale of the units and the enforcement of the "moderate income" limitation would not generate a cause of faction in plaintiff which, by then, would have no right, title or interest in those units.

B. Taking of Property Without Just Compensation

In considering a motion to dismiss, broad factual allegations of injury following from defendants' conduct are sufficient to establish subject matter jurisdiction and to defeat a motion to dismiss for failure to state a claim. *Scheuer v. Rhodes,* 416 U.S. 232, 235-36 (1974). "When a federal court reviews the sufficiency of a complaint, . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims . . . . [I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Id; see also Lujan v. Defenders of Wildlife,* ___ U.S. ___, ___, 112 S.Ct. 2130, 2137 (1992). A pleading of deprivation of property, under color of state law, without just compensation, must allege that opportunities to obtain com-

pensation have been exhausted. *Williamson County Regional Planning Com'n. v. Hamilton Bank,* 473 U.S. 172, 194, 194 n.13 (1985). "[B]ecause the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Id.*

In *Williamson,* the Supreme Court established a two-pronged test of the ripeness of takings claims: (1) the action of the governmental agent alleged to have caused the taking must be a "final decision," *Id.* at 186; and (2) where state law offers "reasonable, certain and adequate provision for obtaining compensation," the Fifth Amendment has not been infringed "until it has used the procedure and been denied just compensation." *Id.* at 195. Plaintiff argues that finality of governmental action required to satisfy the first prong of *Williamson* depends upon whether the property owner's "investment backed expectations" have been blunted in a way that cannot be corrected by further administrative proceedings. Plaintiff asserts that where, as in the present case, the owner has been stripped of title and possession of the property, there is finality to satisfy *Williamson.*

As to the second prong of *Williamson,* exhausting available opportunities for compensation, plaintiff argues that Connecticut lacks the "specific statutory" inverse condemnation remedy that was available under Tennessee law to the *Williamson* plaintiffs. It claims that Connecticut has no statutory or common law action which provides a property owner with a claim for money damages against a municipality for inverse condemnation caused by land use regulations. Plaintiff argues that because there is no such procedure to exhaust, the second prong of *Williamson* does not apply.

Defendants assert that even if plaintiff has satisfied the "final decision" prong of *Williamson,*[1] the complaint fails to satisfy the second prong.

In *Southview Associates, Ltd. v. Bongartz,* 980 F.2d 84 (1992), *cert. denied* 113 S.Ct. 1586 (1993), involving a denial of a land use permit by the Vermont Environmental Board, the court explained:

> [A] state compensation procedure will be deemed available and adequate within the meaning of *Williamson* even when that procedure remains unsure and undeveloped.

Id. at 99 (citations omitted). Neither the statutory nor common law in Vermont provided an action compensating takings by inverse condemnation. However, the Vermont Constitution contains a just compensation clause which was declared sufficient to satisfy the *Williamson* requirements of a "reasonable, certain and adequate provision for obtaining compensation." *Southview,* 980 F.2d at 100 (citation omitted).[2]

The Connecticut Constitution contains a just compensation clause similar to Vermont's:

> The property of no person shall be taken for public use, without just compensation therefor.

Conn. Const. Art. 1 § 11. The Connecticut Supreme Court has held this provision sufficient to support an inverse condem-

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[1] Defendants concede that a "physical" taking of property, as opposed to a "regulatory" taking, satisfies the *Williamson* "final decision" requirement. Defendants argue that their actions constitute a regulatory taking.

[2] The clause states:

> [W]henever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

Vt. Const. ch. 1, art. 2.

nation action. *Laurel, Inc. v. State,* 169 Conn. 195 (1975) (*Laurel I*).

> If there is no legislation that makes provision for compensation for property taken, the [Connecticut] Constitution does; and that is enough.

Id. at 200 (citation and internal quotation marks omitted).

Subsequently, in an appeal of a damage award, it was held

> . . .that just compensation requires that the condemnee shall be put in as good a condition pecuniarily as he would have been in had the property not been taken.

Laurel, Inc. v. Commissioner of Trans., 180 Conn. 11, 37 (1980) (*Laurel II*). Applying this philosophy, the court upheld the aspect of the damage award that represented diminished profitability of the project, despite the fact that "the lion's share of the property" remained in the plaintiff's possession. *Id.* 465. Thus, a "reasonable, certain and adequate" compensatio procedure exists in Connecticut law which plaintiff must exhaust before a Fifth Amendment § 1983 claim can be considered ripe. Plaintiff does not allege pursuit and exhaustion of such procedure. Its constitutional claim is, therefore, not ripe for consideration.

III. CONCLUSION

The motion to dismiss (doc. #14) is granted. The motion fo more definite statement (doc. #14) is denied as moot.

SO ORDERED.

Dated at New Haven, Connecticut, this 25th day of April, 1994.

/s/ Peter C. Dorsey

Peter C. Dorsey
United States District Judge